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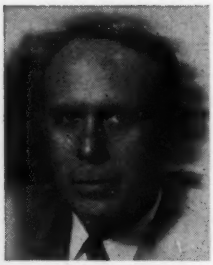
VOL. 30 JULY, 1955 No. 10

The President's Page

By Kenneth N. Chantry

"GIANTS AND PYGMIES"



Kenneth N. Chantry

I have heard it said that the legal giants are dead, but I don't believe it. Although I must confess that at times it does appear that they slumber. The perspective of time will tell us whether our colleagues of today are giants or pygmies.

Certainly one of the criteria of legal greatness is that quality of intestinal fortitude which among members of the profession we may plainly refer to as GUTS.

I do not mean by that that the lawyer must or should represent his client with vehement arrogance. He does have the duty to stand up for client and cause against the buffets of both his opponents at the bar and his judges on the bench.

The judge deserves the courtesy of the lawyer, and reciprocally should courteously deal with the bar. But no man, though he be a judge, need be fawned upon—least of all by lawyers. And there are moments in the course of litigation when the lawyer must stand up and politely bring down to the good earth of mortals—even the august presence on the bench.

I am reminded in this connection of the incident in the career of attorney Lloyd Paul Stryker, originally reported to the public by the late Alexander Woollcott in the pages of the *New Yorker*, and more recently in Stryker's own worthy book, "The Art of Advocacy."

In the course of argument before the New York Court of Appeals Stryker was rebuked in sharp and sarcastic terms by one of the Justices who objected to counsel's roaring delivery. Stryker's reply is classic:

> "I am very sorry that the tone of my voice should have been such as to annoy Your Honor. I regret it. Perhaps my fault lies in the fact that I have never yet been able to encounter outrage with complacence. Nor have I yet attained that poise which would enable me to speak in the quiet tones of equanimity about an effort to strip an American citizen of his liberty by perjured testimony. And yet I have one consolation. As I think back to that little Boston State House in February, 1761, when James Otis before a hostile court thundered against the Writs of Assistance, I am satisfied that he too on that occasion raised his voice."

The lesson cannot be learned too well nor repeated too often.

Issue Editor—Lester E. Olson

The Sherman Anti-Trust Law in Review

By George B. Haddock*

[EDITOR'S NOTE: This is the second installment of Mr. Haddock's article. The first installment appeared in the June issue of the BULLETIN.]

What is the significance of the words "combination and conspiracy" appearing in the Sherman Act? It is important to recognize that the Act does *not* prohibit restraints of trade; it does *not* compel competition; it does *not* seek to tell business men how they should conduct their business affairs, or what prices to charge, or what customers to accept, or what areas they shall trade in. Absent monopoly power, any person may restrain trade or refuse to compete, as long as his action is not pursuant to contract, combination, or conspiracy.

In the *Colgate*[27a] case, it was held that a seller may choose his customers, and may refuse to sell to anyone who follows practices or charges resale prices of which the seller disapproves, as long as his decision is his own and is not pursuant to conspiracy.

The court decisions provide no sound basis for the bugaboo that the Sherman Act may be construed to apply to individual, nonconspiratorial activities of business men under the sinister "doctrine" of conscious parallelism of action." This doctrine can be paraphrased as follows: A number of competitors come to the conclusion that price competition is unprofitable and just plain silly. Each of them adopts a system of pricing which he believes and has reason to expect will be followed by his competitors, as a result of which the prices of all become uniform and noncompetitive. The effect of these individual decisions is to suppress and eliminate price competition just as effectively as if there had been an agreement to attain that result. Therefore, since the Sherman Act is intended and designed to foster and protect competition, it should be applicable to this situation.

I confess that I have been beguiled by this reasoning. However, it is predicated upon the basic fallacy that the Sherman Act is intended to prohibit restraints of trade and to compel competition. Actually, it is designed only to protect competition against conspiratorial activities or monopoly power which impair or destroy competition.

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The statements and opinions herein are those of the writer and do not necessarily reflect the views or opinions of the United States Department of Justice.

[27a] *United States v. Colgate Co.*, 250 U.S. 300 (1919).

There has been only one instance of which I have knowledge where an attempt was made to have the Sherman Act applied to a restraint of trade which did not involve a monopoly or a contract or conspiracy. More than thirty years ago a suit was filed against the *Cement Manufacturers Protective Association*[28] charging an unlawful restraint of trade under section 1 of the Sherman Act by reason of certain activities which necessarily resulted in uniform prices and limitation of production. It did *not* charge that there was any conspiracy or agreement or understanding among the defendants to place limitations upon either prices or production. The Supreme Court held that in the absence of a claim that there was agreement or understanding, and in the absence of proof, either direct or inferential, of any agreement or concerted action, there was no violation of the Sherman Act.

This does not mean that the existence of an understanding or agreement to suppress competition cannot be inferred or implied from what is done, or that every conspiracy must be an express one as to which there is direct proof. The courts have repeatedly recognized that direct evidence of an express agreement might not exist, but that the facts and circumstances may be such as to establish the existence of an actual, though tacit, agreement or understanding which constitutes conspiracy. In other words, mere price identity does not, standing alone, prove agreement, but it may be evidence which, along with other evidence, leads to a finding that an agreement existed.

The essentiality of conspiratorial agreement as a necessary element in a violation of section 1 of the Sherman Act was affirmed by the Supreme Court in *Parker v. Brown.*[29] It was there contended that participation in a marketing program for raisins under the California Agricultural Prorate Law violated the Sherman Act. Unquestionably there was a substantial and direct restraint upon interstate trade, but the Court held that the necessary element of conspiracy was lacking. The program was never intended to operate by force of individual agreement or combination, but by force of mandatory State law. The State made no agreement and entered into no combination or conspiracy, but rather, as a sovereign, imposed a restraint as an act of government which the Sherman Act does not prohibit. Too much should

[28] *Cement Manufacturers Protective Assn. v. United States,* 268 U.S. 588 (1925).
[29] *Parker v. Brown,* 317 U.S. 341 (1943).

not be read into this decision. It does *not* hold that a State, by the enactment of legislation, may usurp the Constitutional power of Congress over interstate commerce and thus declare to be lawful a conspiracy to restain trade which is unlawful under the Sherman Act.

To sum the matter up, an agreement must be proved, expressed or implied, by direct or circumstantial evidence, and a violation of the Sherman Act will not be *construed* or *constructed* merely because the results of nonconspiratorial action may directly and substantially restrain trade.

The discussion thus far has not dealt with the meaning of the word *"contract"* in restraint of trade. Decisions as to whether or not contracts restrain trade in violation of the Sherman Act still leave many uncertainties and ample room for differences of opinion among lawyers. The subject is one which is too complex and difficult to attempt to analyze and discuss intelligently within the space at my disposal here, and I can only mention a few of the types of contracts which have been considered and held to violate either the Sherman Act. or section 3 of the Clayton Act, and to refer to a few cases and the principles for which I think they stand.

Those who are particularly interested in this aspect of antitrust law would do well to look at an article entitled "Antitrust Aspects of Exclusive Dealing Arrangements," appearing in the January 1952 issue of the Gergetown Law Review. It was written by Baddia J. Rashid, an attorney in the antitrust Division, and is an excellent discussion of a difficult subject.

Contracts which have been held to violate the antitrust laws include "exclusive dealing" or "requirements" contracts and "tying" contracts. In one, buyers are required to agree that they will deal exclusively in a product or products of the seller, and "tying" contracts make the sale of one product contingent upon the purchase by the buyer of another product of the seller.

There are always dangers in generalization, but I believe that the test of illegality of an exclusive dealing or tying contract is less severe under the Clayton Act than under the Sherman Act. Most of the appellate court decisions which hold that an exclusive dealing or tying contract violates the Sherman Act involve circumstances in which the seller either possesses some form of monopoly power, or at least a dominant market posi-

tion, which would be extended and enhanced by the exclusive dealing arrangement under consideration, or else there was present an obvious intent and purpose to deny to competitors access to a substantial market coupled with the probability of success.

To illustrate, in the *International Salt*[30] case, the defendant had a patent monopoly over certain types of salt dispensing machines. It leased those machines on the condition that the lessee purchase from the lessor all salt tablets to be used in the machines. The Supreme Court held that this lease agreement extended the lawful monopoly of the defendant over the machine to an unlawful monopoly in the sale of unpatented salt tablets used therein. This extension of a lawful monopoly into an unlawful monopoly was held to be a restraint of trade which was inherently an unreasonable restraint, and thus was a *per se* violation of the Sherman Act. The Court in that case made the often-quoted statement:

> "It is unreasonable per se to foreclose competitors from any substantial market."

From this it has been argued that any contract, the result of which is to foreclose a competitor from any substantial market, is *per se* unlawful. I doubt that this principle would be literally applied to all possible circumstances.

In other decisions of the Supreme Court and Courts of Appeal on this subject, the seller has always possessed some form of monopoly power or dominant market position. Included in such cases were: A requirement by the largest manufacturer of automobiles that its dealers use the financing services of a subsidiary of the seller;[31] requirements by producers of motion pictures and their distributors, who controlled 60 per cent of the motion picture films in the country, that exhibitors must use a designated credit committee and submit to uniform arbitration procedure;[32] a requirement by an important producer of motion pictures that, in order to secure films made by it, distributors and exhibitors must also accept other films not necessarily desired by them;[33] and a requirement by a manufacturer of 75 per cent of all photographic equipment that dealers handle its goods exclusively.[34]

[30] *International Salt Co. v. United States*, 332 U.S. 392 (1947).
[31] *United States v. General Motors Corporation*, 121 F. 2d 376 (CCA 7, 1941).
[32] *United States v. First National Pictures, Inc.*, 282 U.S. 44 (1930). *Paramount Famous Lasky Corporation v. United States*, 282 U.S. 30 (1930).
[33] *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).
[34] *United States v. Eastman Kodak Co.*, 226 Fed. 62 (D.C. W.D. N.Y. 1915).

In the *Standard Stations*[35] and *Richfield*[36] cases, the district court held that a series of exclusive dealing contracts between refiners and service stations, the effect of which was to foreclose competitors of the refiners from access to a substantial market, violated both the Sherman and Clayton Acts. The Supreme Court affirmed the holding that the Clayton Act was violated, but did not pass on the issue of Sherman Act violation, holding that it was not necessary to do so.

As I have devoted considerable space to a discussion of cases involving section 1, I can do little more than to refer generally to a few cases involving section 2 of the Act.

The 1911 *Standard Oil* and *American Tobacco* cases were the first important monopoly cases to receive Supreme Court review. In both of these cases, the Court concluded that the evidence had clearly proved the establishment and existence of monopoly power, and the ruthless exercise of that power effectively to suppress and eliminate competition. Intent to eliminate competitors and to control prices in the market was clearly evident.

The next significant monopoly decisions were in the *United States Steel*[37] and *International Harvester*[38] cases, in 1920 and 1927. The Court held, in effect, that it was not enough for the Government to prove that the defendants possessed the power to exclude competitors, to fix or control prices, to restrict production, or otherwise to suppress competition, but that it was also necessary to establish that this power had actually been used, *with specific intent and effect,* to accomplish one or more of these results. In other words, the Government was required to carry the very difficult burden of proving that the things done in the perfection and operation of a monopoly were done with the specific intent and the effect of eliminating competition or otherwise directly restraining trade.

This situation existed until the decision in 1945 in the *Aluminum*[39] case, in which a defense was made on the theory that Alcoa "was a natural" monopoly which had attained its position through efficiency and natural evolution, and that in the absence of specific

[35] *Standard Oil Company of California and Standard Stations, Inc. v. United States,* 337 U.S. 293 (1949).
[36] *Richfield Oil Co. v. United States,* 343 U.S. 922 (1952).
[37] *United States v. United States Steel Corporation,* 251 U.S. 417 (1920).
[38] *United States v. International Harvester Co.,* 274 U.S. 693 (1927).
[39] *United States v. Aluminum Company of America,* 148 F. 2d 416 (CCA 2, 1945).

intent and purpose to exclude competitors or suppress competition, Alcoa had not violated the law. The district court agreed with the defendant. A special three-judge court was established by act of Congress to hear and determine the appeal, as so many Justices of the Supreme Court disqualified themselves that a quorum did not exist. This special court decided that Alcoa had unlawfully monopolized the aluminum ingot business. It held that the Government need not establish the existence of a *specific* intent to monopolize or to eliminate competitors and that the Government need prove only that Alcoa had the power to exclude competitors and to suppress competition coupled with a "general intent" to use that power. The reasoning of the Court is cogently stated in the phrase: "No monopolist monopolizes unconscious of what he is doing."

I think that the *Alcoa* decision might be said to hold that a company which completely controls a line of commerce, having over 90 per cent of the business and possessing demonstrable power to maintain or increase its position, is *per se* monopolizing that industry. Since there remain few, if any, industries at the present time which are so completely monopolized by one single company, this *per se* doctrine in monopoly cases has very little application to most situations.

Monopoly cases usually involve situations in which there is a financially interrelated group of companies acting, to all intents and purposes, as a single entity, such as the *Griffith*,[40] *Schine*[41] and *Yellow Cab*[42] cases; or a conspiracy to monopolize among a group of competitors who together possess and collectively utilize the power to exclude competitors or suppress competition, such as in cases brought against concerns in the *fertilizer*,[43] *chemical*,[44] *gypsum*,[45] and *masonite*[46] industries.

An important decision was handed down in 1946 in the second *American Tobacco*[47] case. This is one of the few criminal monopoly cases to reach the Supreme Court. The district court had charged the jury that monopolization meant, "the joint acquisition or main-

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[40] *United States v. Griffith*, 334 U.S. 100 (1948).
[41] *United States v. Schine Chain Theatres, Inc.*, 334 U.S. 110 (1948).
[42] *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).
[43] *United States v. Allied Chemical & Dye Corp., et al.*, filed May 29, 1941, S.D. N.Y., resulting in entry of a consent decree.
[44] *United States v. General Chemical Co., et al.*, filed November 4, 1943, D.C. N.J., resulting in pleas of *nolo contendere* and fines.
[45] *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950).
[46] *United States v. Masonite Corp.*, 316 U.S. 265 (1942).
[47] *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

tenance by members of a conspiracy formed for that purpose, of the power to control and dominate interstate trade and commerce to such an extent that they are able, as a group, to exclude actual or potential competitors, accompanied with the intention and purpose to exercise such power."[48] The Supreme Court upheld this charge saying that a showing of actual abuse of monopoly power is not necessary and that illegal monopolization consists of "power to exclude competitors and to fix or control prices in the market, with intent to use that power."

Thus, there are certain general standards to test monopoly, but since the programs and activities differ in each case, and may involve such diverse factors as acquisitions of competitors, punitive price cutting, misuse of patents, utilization of vertical and horizontal integration, control of raw materials, control over markets, and discrimination in prices, each case must be decided pretty much on its own facts.

An area of remaining uncertainty in section 2 cases involves the meaning of the words "any part" of interstate trade and commerce.

The 1911 *Standard Oil* decision stated that the words "any part" of trade and commerce had both a geographical and distributive significance, including any portion of the United States and any of the "classes of things" forming a part of commerce. It was held to be possible to monopolize "a particular commodity" and that the monopolization might be limited to a part of the country.

The *Standard Oil* decision was consonant with the prior decision in the *Montague v. Lowry*[49] case, where the Court held that the distribution of unset fireplace tile within a 200-mile radius of San Francisco was a part of interstate trade and commerce within the meaning of the Sherman Act, since said tile was an article of commerce between the States, even though it amounted to only about 1 per cent of the total sales of all kinds of tile, set and unset, in the area.

Monopolization of the farm paper business, including the publication, circulation, and distribution of advertisements therein, within a five-state area, was illegal, without any showing that there was monopolization of that business on a nation-wide basis, or that there was monopolization of all kinds of newspaper or trade periodical business within the five-state area.[50]

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[48] *American Tobacco Co. v. United States*, 147 F. 2d 93, 109 (CCA 6, 1944).
[49] *Montague v. Lowry*, 193 U.S. 38 (1904).
[50] *Indiana Farmers' Guide v. Prairie Publishing Co.*, 293 U.S. 268 (1934).

Monopolization of the business of supplying taxicabs to cab companies in four cities was monopolization of a part of interstate trade and commerce regardless of the minor percentage relationship of such cabs to total taxicab sales throughout the United States, or to the total automobile sales in those four cities.[51]

"Any part" of interstate trade and commerce means "any appreciable part" thereof.[52] Or, to put it another way, any part of trade and commerce means "any definable segment of trade or industry which constitutes, as it were, a kind of separate market."[53]

From the foregoing cases, it would appear that any identifiable, definable or segregable line of trade and commerce, or commerce in any distinguishable, definable, or segregable commodity, may be the subject of illegal monopolization. A judgment was recently entered in a case[54] charging monopolization of the business of writing or placing fire and hazard insurance on residential property upon which the monopolist had mortgage loans. The Government in that case contended that the business of writing or placing fire insurance on a half billion dollars' worth of residential property on which the defendant had mortgage loans was a segregable and identifiable part of commerce even though the insurance business so monopolized was only a small part of the total business of writing fire insurance on all residential property in the area.

In the *Patterson*[55] case, the Circuit Court of Appeals for the Fourth Circuit, in 1915, held that one who monopolizes must have monopoly control over the trade and commerce in the commodity of all prospective purchasers, but subsequent cases recognize that a distinction should be drawn between classes of customers and that it was possible to monopolize the trade and commerce in a commodity in certain classes of buyers even though the monopoly might not extend to other classes of buyers. In the *Klearflax*[56] case it was held that it was unlawful for a manufacturer of linen rugs, who had permitted its wholesale distributors to compete with it and with each other in the sale of linen rugs to governmental

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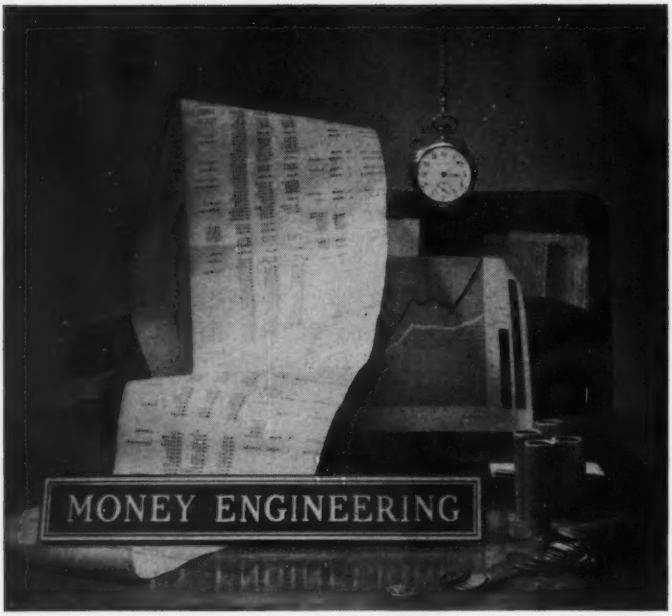
[51] See Note 42, *supra*.
[52] *Lorain Journal v. United States*, 342 U.S. 143 (1951); *United States v. National City Lines*, 186 F. 2d 562 (CCA 7, 1951).
[53] *Cape Cod Food Products, Inc. v. National Cranberry Assn., et al.*, 119 F. Supp. 900 (D.C. Mass. 1954).
[54] *United States v. Investors' Diversified Services*, Civil Action No. 3713, D.C. Minn., consent judgment entered 1954.
[55] *Patterson v. United States*, 283 U.S. 163 (1915).
[56] *United States v. Klearflax Linen Looms*, 63 F. Supp. 32 (D.C. Minn. 1945).



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agencies, to exclude those distributors from future sales to the Government, and that such action constituted monopolization of a part of interstate trade and commerce in the sale of linen rugs, to wit, sales to governmental agencies.

It seems obvious that monopolization of the sale of a commodity to wholesale distributors or to retail distributors would be monopolization of a part of commerce without the necessity of proving that the monopolist also monopolized all sales to ultimate consumers.

In recent years there has been much discussion of a suggestion that no monopolization should be found to exist with respect to any commodity for which unmonopolized substitute or alternative products exist. The argument appears to be that unless the monopolist exercised control over the substitute products, the competition from them will insure that he cannot use his control over a single product in a manner injurious to the public interests. Under this argument, one who monopolizes the aluminum ingot market would not be held to be illegally monopolizing a part of interstate trade and commerce, because steel and copper and plastics and wood and magnesium and scrap aluminum are competitive with aluminum made with new ingots. If this argument were carried to its natural conclusion, it would result that no illegal monopoly could exist with respect to anything except those few things, such as air, water, and fire, which are absolutely indispensable to the survival of mankind, since some kind of substitute exists for almost everything. The courts have given consideration to this contention. In the *Associated Press*[57] case, the Supreme Court quoted with approval the holding of the Court of Appeals in stating:

> ". . . monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose. * * * And yet that advantage alone may make a monopoly unlawful."

In the *Paramount Pictures*[58] case it was held that monopolization of the "first run" or first exhibition of motion pictures was a part

[57] *Associated Press v. United States*, 326 U. S. 1 (1945).
[58] See Note 33, *supra*.

of commerce capable of being monopolized even though the monopolist did not have monopoly control over subsequent exhibitions, it being recognized as a practical matter that first run was the "cream" of the exhibition business, and the business of exhibiting first run pictures was a distinct and different business from exhibiting second or subsequent runs.

In the *Corn Products*[59] case, Judge Learned Hand held that control of commerce in cornstarches constituted monopolization of a part of trade and commerce despite competition from sago, tapioca, and other starches, saying that at most these substitute products merely placed a limitation upon the extent to which the monopoly in cornstarch might be exercised to raise prices.

However, there have been decisions holding that there must be a valid basis for distinguishing or segregating the line of commerce monopolized. In one of the several *Standard Oil* cases[60] the Supreme Court held that production of "cracked gasoline" was not a separable part of commerce since "cracked gasoline is not distinguishable from the straight run. They are mixed or sold interchangeably . . ."

It has been held that the fact that a standard gas range is identified by a brand name, standing alone, is insufficient to distinguish or separate trade in that product from trade in other standard gas ranges which are in the same competitive class.[61]

One important recent decision by a district court, in the *Cellophane*[62] case, holds that it is not enough that the product involved be distinguishable, on the basis of physical and chemical characteristics, from competitive products. The Court found that waxed paper, glassine, aluminum foil and other "flexible packaging" products were "as satisfactory" in many respects as cellophane, and better in some, and that some of them were cheaper than cellophane. In dismissing the complaint the Court did *not* directly hold that commerce in cellophane was not a "part of" interstate commerce, or that it was merely one of several products which together constituted a "part of" commerce. However, the same ultimate result was reached by the conclusion that the "degree of control" prohibited by the Sherman Act "is that which permits disregard for competitive factors," and that the "flexible packaging market"

[59] *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S.D. N.Y. 1918).
[60] *Standard Oil Co. v. United States*, 283 U.S. 163 (1931).
[61] *Fargo Glass & Paint Co. v. Globe American*, 201 F. 2d 534 (CCA 7, 1953).
[62] *United States v. duPont*, 118 F. Supp. 41 (D.C. Del. 1953).

was the market which would be considered in determining whether monopolization existed. Thus, the Court substituted trade and commerce in "flexible packagings" for "trade and commerce in cellophane" as charged in the complaint, and held that the Government had not proved monopolization. This decision is now on appeal to the Supreme Court, and the decision there may help to resolve uncertainties in this area of Sherman Act interpretation.

In addition to establishing proof of monopolization, very serious problems of relief exist in all monopoly cases. It is easier to prove that an omelet exists than to unscramble the eggs that went into it, and competition that has been killed is difficult to resurrect. The practicability and feasibility of relief, and the probability of persuading a court to grant that relief are factors which have influenced, and doubtless will continue to influence, the Government in the bringing of monopoly cases.

Thus there is more uncertainty in the application of the Sherman Act to monopolization cases than to conspiracies in restraint of interstate trade. It might be said that the status of the law with respect to monopoly is somewhat comparable to the status of Section 1 cases following the announcement in 1911 of the "rule of reason." There have not yet been a sufficient number of monopoly cases presented for decision to establish any definite pattern permitting the development of more precise definitions or specific rules, such as the *per se* doctrine in section 1 cases.

I have reviewed some of the cases and court decisions under the Sherman Act since 1890. What does the future hold? I am not clairvoyant, but there are certain guides which I have found helpful in my own appraisal of the future of Sherman Act enforcement.

We are in a period of great merger activity. Some of these mergers will undoubtedly raise serious questions of violation of section 2 of the Sherman Act, while others may require action under the recent amendment to section 7 of the Clayton Act, which has not yet been tested and interpreted by Supreme Court review.

I am convinced that strenuous and continuing efforts will be made by the Government to enforce the basic principles for which the Sherman Act stands. Well over 100 Sherman Act cases pending in January 1953 have been energetically prosecuted, including many old cases which had been in a state of suspended animation for years. Over half of them have been terminated, most by the

entry of judgments, although a few were dismissed on the ground of mootness or because of insufficient evidence to warrant trial. In addition to vitalizing and speeding up the prosecution of these pending cases, many new cases have been brought, including several contempt proceedings for violations of past decrees.

It is clear from its deeds that this administration intends to vigorously prosecute violations of the antitrust laws. Proposals have been made to the Congress for the strengthening of the Sherman Act, including an increase in the maximum fines which may be imposed to permit the Government to sue for damages incurred by it as a purchaser resulting from violations of the antitrust laws.

Numerous proposals have come from many sources for modifications of the antitrust laws, and the Attorney General established a National Committee to study the antitrust laws, which has done a great deal of work and which has recently submitted its report and recommendations.

As one who believes firmly in the continued existence of an economy based upon free enterprise and regulated primarily by competition, I am optimistic that our nation will continue to adhere to the principles underlying our antitrust laws and will avoid dangers which are inherent in efforts to weaken or narrowly limit their scope and application.

Once in 1933 we came perilously close to abandonment of the principle that competition, rather than cartelization or governmental control, should guide our economic destiny. When we suspended the operation of the antitrust laws during the life of the National Recovery Administration, we nearly adopted the principles which have guided numerous other industrial nations, and we toyed with the thought of embracing cartelization, with resultant temporary stability and security, and ultimate stagnation, as our standard.

We turned partly away from this policy when the NRA was declared to be invalid in 1935, but only partly, because we have continued to experiment with the idea of competition-free industries through the adoption of resale price maintenance laws and other legislation, both federal and state, exemption segments of our economy from the antitrust laws.

I feel hopeful that our nation will decide that the immediate benefits, imaginary or real, which might result from the attainment of stability and security through monopoly or government control, are not worth the ultimate price which will have to be paid.

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

The objectives of this department have been modest. To the extent that any space has been available in the *Bulletin* from month to month, after the requirements of its more scholarly and creative ventures have been met, we have undertaken to report what lawyers beyond our bailiwick have been doing and saying. For the most part we have done this factually and without embellishment. On occasion we have dropped a comment or two of our own, but even then we have not attempted to originate anything that would shake the world.

* * *

We must nevertheless report that the world has been shaken, and it looks like we did it. Or at least we set off a chain reaction that has had that effect.

* * *

It all started quite innocently several months ago with this little item:

> *The Brief Case,* monthly publication of the Bar Association of San Francisco, has taken on a new and very engaging look. In fact, it is now one of the most attractive association publications that we are privileged to receive.

* * *

The first and, until recently, the only reaction we had to this little nosegay, came from Milton E. Bachmann, Executive Secretary of the State Bar of Michigan. He wrote us a letter in which he expressed amazement and dismay that we in Los Angeles could speak well of anything emanating from San Francisco. His letter was rather amusing, so we ran it in a later issue and thought that was that.

* * *

But not so. Now on our desk is a recent issue of *The Brief Case* which has picked up our story about Mr. Bachmann's letter, and

our little 39-word item which evoked it, and has blown them into a full-fledged article by Gerald S. Levin. Across the top is splashed in big, bold letters:

BROTHERLY LOVE!

Tribute of *Los Angeles Bar Journal* to *The Brief Case*
Hailed as Noble Gesture by Michigan Bar Official

It must be read in full to be fully appreciated, but we can tell you this: The little bouquet we tossed upon the editorial waters has returned as a series of handsome floral pieces for the *Bulletin* and the bar of Southern California. Reportorial candor, not ingratitude, requires us to observe that plenty of the same was left over for home consumption. Indeed, one gets the impression that Twin Peaks have been cleft in twain by an orchidaceous eruption of titanic proportions that has overwhelmed *The Brief Case* and swept on to engulf San Francisco from Seal Rocks to the Ferry Building.

Beyond all that, Mr. Levin proclaims an Era of Brotherly Love between his city and ours which should stand throughout the ages as an example to all peoples and all nations.

Obviously it would be *ultra vires* the functions of this department to commit the local bar in a matter of such gravity. The most it can do is to urge that we grasp this fraternal hand so vigorously thrust across the Tehachapis. Even here adherence to the higher precepts of ethics requires the disclosure, for those who aren't aware of it, that the architect of this column has many attachments to San Francisco, personal and professional, which the skeptical might regard as warping his judgment about the merits of such a proposal.

Incidentally, it appears that Mr. Levin would be quite happy to admit Michigan to this entente cordiale except for one thing: Mr. Bachmann committed "the unpardonable error" of referring to our loving and lovable neighbor as "Frisco."

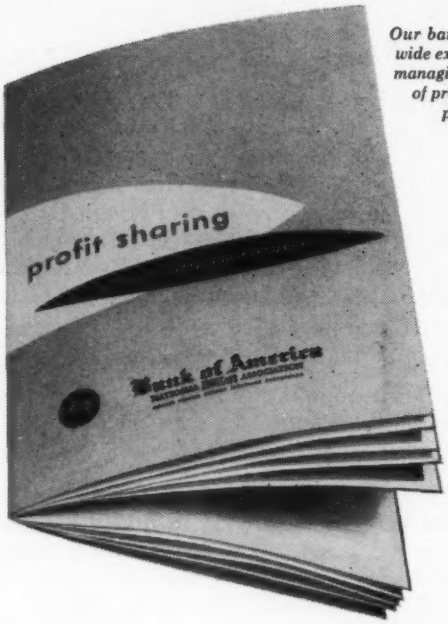
That's being a little rough on Mr. Bachmann, it seems to us. "Error," true; but hardly "unpardonable." For a first offender a stern reprimand and a little historical lecture should suffice. After that we will go along with any penalty our San Francisco brethren seek to impose, provided they make it equally applicable to those who, through indolence or indifference, or with malice aforethought, barbarize the beautiful name of the City of Angels into "L.A." We are sure our cultured cousins by the Bay are never themselves guilty of such verbal vandalism.

One thing more: Just to show we aren't excessively touchy ourselves, we're going to overlook the fact that the headline to Mr. Levin's gracious literary gesture refers to our publication as the *Journal,* rather than the *Bulletin.* After all, if we're going in for brotherly love we'll have to remember the words of St. Paul: "Love suffereth long, and is kind . . . is not provoked . . . endureth all things." Which, even according to the most liberal construction, means "at least a few things."

* * *

One evening of the annual convention of the **Iowa** State Bar Association was devoted to a Sip and Snack Session at the Hotel Fort Des Moines and attendance at the ball game.

This pamphlet will help YOU help your client...



Our bank has had wide experience in managing all types of profit-sharing plans.

Because of the widespread demand for information on profit-sharing programs, we have prepared another pamphlet on this subject, called "Profit Sharing, and How It Benefits Your Company." If you would like copies for your clients, simply write our Trust Department (at San Francisco or Los Angeles) ...or ask at any Bank of America branch.

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Opinions of the Committee on Legal Ethics Los Angeles Bar Association

OPINION NO. 219
(May 14, 1954)

ATTORNEYS AS EXECUTORS, TRUSTEES—CONFLICTING INTERESTS. An Attorney, one of a partnership, can Serve as Executor or Administrator of an Estate and Select One of His Partners as Attorney Provided Compensation for Respective Duties is Kept Separate. Attorney Can Serve as Trustee for Various Testamentary Trusts but in Event of Conflict, Attorney and His Partners and Associates Should Sever Connections With All Conflicting Interests.

A firm of attorneys makes the following inquiry:

"A, B and C are partners in a law firm. During the life of X they represented X individually and represented the corporations and partnerships in which X had a controlling interest. On the death of X, A was named as one of the executors of his estate, as one of two trustees of three testamentary trusts for the children of X, and as one of several trustees in a charitable trust created by the will of X. A was also given a legacy in his own right for about $10,000.00.

"A. B and C have continued to practice law under their firm name and style of A, B and C, Counsellors at Law. However, B and C have undertaken representation of A and others as executors and trustees in X's estate as set forth above. Although letters from B or C are sent on the stationery of A, B and C, they are always signed B for B and C. Moreover, documents filed in court have the attorneys' names and addresses set forth as B and C, attorneys for executors or trustees as the case may be.

"A, B and C at the same time are continuing the general practice of law and are continuing to represent corporations and partnerships in which X had had a large and even a controlling interest during his lifetime."

A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned. (Rule 7, Rules of Professional Conduct of the California State Bar; Canon 6 of the Canons of Professional Ethics of the American Bar Association). See also Rule 5, Rules of Professional Conduct, California State Bar.

Assuming there is no conflict with respect to the corporations and partnerships, it is proper that A, B and C represent the corporations and partnerships.

Assuming further that there is no will contest, it is proper for

A to serve as executor of the estate of X and to serve as trustee for trusts for the children and for the charitable trust until the estate has been distributed. It is further proper for A to serve as executor of the estate of X and as trustee and employ B and C as attorney provided compensation for the respective duties is kept separate and apart. All of the trusts should be notified of the circumstances.

Under those circumstances where beneficiaries of the trusts might sue (and not A sue as trustee), A, taking no position himself, should give notice of claims which he cannot resolve and request the court for instructions.

Where, however, a conflict arises as, for example, a dispute between the trusts for the children on the one hand and the charitable trusts on the other hand, A should withdraw from both trusts. B and C together with A, having acquired information as a result of their previous representation of all parties, should also withdraw from that representation.

This opinion, like all opinions of the Committee, is advisory only (By-Laws; Article X, Section 3).

OPINION NO. 221
(July 22, 1954)

LECTURES ON LEGAL SUBJECTS—A lawyer may, under the auspices of the Y.W.C.A., give a series of lectures upon legal subjects, provided that he avoids rendering opinions to his listeners on their personal problems and does not violate the rules against advertising.

A lawyer has asked that the Committee review the propriety of his accepting an invitation of a local Y.W.C.A. "to give a series of 12 lectures touching upon certain legal problems that confront the young housewife." He has submitted a tentative "schedule" which includes a list of the 12 lecture topics (The Judicial System; General Legal Problems; Community Property; Wills, etc.), which states that there will be a question and answer period following each lecture, and which gives the name and a biographical sketch of the lawyer-lecturer. Apparently this schedule will be used as an announcement or advertisement of the lecture.

Neither the American Bar Association Canons of Professional Conduct nor the California State Bar Rules of Professional Conduct prohibit lectures or speeches on legal subjects. A.B.A. Canon 40 provides:

> "A lawyer may with propriety write articles for publications in which he gives information upon the law, but he should not

> accept employment from such publications to advise inquirers in respect to their individual rights."

If he may publish written articles, it would seem permissible that a lawyer may give lectures. Lawyers have customarily acted as lecturers in business law courses for laymen. The lawyer must, however, avoid the giving of legal advice on their personal problems to those who attend the lectures and avoid improper advertisement.

In the scheduled question and answer period, it is almost certain that the housewives who attend the lectures will put questions to the lecturer designed to answer their personal legal problems. The giving of answers to such questions would violate Rule 18 of the State Bar Rules of Professional Conduct, which provides as follows:

> "A member of the State Bar shall not advise inquirers or render opinions to them through or in connection with a newspaper, radio or other publicity medium of any kind in respect to their specific legal problems, whether or not such attorney shall be compensated for his services."

The giving of such answers would very likely also violate A.B.A. Canon 35.

The inclusion in the proposed schedule of the lawyer's biographical sketch would, in the opinion of the Committee, constitute improper advertising in violation of A.B.A. Canon 27 and Rule 2 of the California State Bar Rules of Professional Conduct. The reference to the lawyer should be limited to his name and to the fact that he is a lawyer. (See Drinker on Legal Ethics, p. 264.)

This opinion, like all other opinions of this Committee, is advisory only. (By-Laws, Article X, Sec. 3.)

OPINION NO. 222
(October 15, 1954)

FEES. DIVISION OF NET PROFITS WITH SECRETARY, AN UNLICENSED PERSON. An attorney is prohibited from an arrangement whereby his secretary is paid a percentage of the net profits of his law practice as part of her compensation.

A lawyer has directed the following inquiry to the Committee:

> "Is there anything unethical in an attorney paying his secretary as part of her compensation a salary plus a percentage of net profits, there being no other conditions attached to the matter?"

Assuming that the secretary is not licensed to practice law, it is the opinion of the Committee that it is improper for an attorney to

agree to pay his secretary as part of her compensation any percentage of the net profits of his law practice.

Such an arrangement in the opinion of the Committee would be violative of both Rule 3 of the Rules of Professional Conduct of the State Bar of California, and Canon 34 of the Canons of Professional Ethics of the American Bar Association, for the same and all of the reasons set forth in Opinion No. 190 of this Committee (February 19, 1952), published at page 365, Los Angeles Bar Bulletin, issue of July, 1952.

This opinion, like all other opinions of this Committee is advisory only. (By-Laws, Article X, Section 3.)

OPINION NO. 223
(February 11, 1955)

CONFLICTING INTERESTS. CONFIDENTIAL COMMUNICATIONS. WITHDRAWAL OF EMPLOYMENT. Duty of Attorney to Continue Representation of Client Precludes Acceptance of Employment by Defendant Against Third Person in Action Arising Out of Same Occurrences. Withdrawal as Attorney for Plaintiff.

A lawyer has presented the following inquiry to the Committee:

> "I was retained by Party A to enforce his cause of action for damages for personal injury against Party B and Party C. Upon investigation, it appeared that A had a very slight chance, if any, of prevailing against B but had a good cause of action against C. After questioning B as part of the investigation of A's case, B asked me to represent him to enforce any cause of action he might have against C. It was clear that B had no cause of action against A but a good cause of action against C.
>
> "Under these circumstances, would it be proper for me to accept B's case against C and enforce A's claim only against C, it being my opinion that A has a very poor chance of establishing a claim against B? Further, if it is proper to represent both A and B against C under the circumstances, would it be proper to advise A that, since his cause of action will outlaw in about thirty days, he must file an action in propria persona against B in order to preserve any rights he might have and to aid A in drafting the Complaint for him in general form, it being clearly understood by both A and B that I will never represent either in any controversy between them, arising out of this action?"

Since the lawyer was retained by A to enforce A's claim against B and C, he cannot accept employment to represent B against C. Even though, in the lawyer's opinion, A's claim against B may appear to be weak, the interests of A and B are both adverse and

conflicting. He could not, with all sincerity and candor, represent A against B while, at the same time, representing B against C.

A lawyer owes his client the obligation of undivided fidelity, and the lawyer should avoid not only situations where a conflict of interest is actually presented, but also those in which a conflict is likely to or may develop.

In his text on "Legal Ethics," Henry S. Drinker, at page 113, states the rule broadly, as follows:

> "One representing B against C may not at the same time represent C against D; . . ." (Citing: N. Y. County 292.)

Canon 6, American Bar Association, provides in part as follows:

> ". . . Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids . . . the subsequent acceptance of . . . employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed . . ."

Canon 6 covers two distinct obligations: (1) Not to represent conflicting interests, and (2) not to disclose confidential communications. The first obligation covers not only cases in which confidences have been bestowed, but also those in which the lawyer assumes to represent parties having conflicting interests with whom the lawyer has had no previous dealings or confidential discussions. (Drinker, Legal Ethics, page 104, et seq.)

Canon 37, American Bar Association, "Confidences of a Client," provides in part as follows:

> "It is the duty of a lawyer to preserve his client's confidences . . . A lawyer should not continue employment when he discovers that his obligation prevents the performance of his full duty to his former or to his new client."

See also in this connection Opinion 99, American Bar Association, appearing on page 214, American Bar Association Canons of Professional and Judicial Ethics, Opinions of Committee on Professional Ethics and Grievances, 1947 Edition.

Further, under Canon 44, American Bar Association, a lawyer may not withdraw from employment once assumed, without good cause, even with the client's consent in some situations.

The interests of A and B being adverse, the lawyer may not represent B in connection with the matter in question, even though B's claim may be against C only. Nor may the lawyer ethically

withdraw as A's counsel as regards A's claim against B under the circumstances. It necessarily follows that the lawyer may not ethically advise A to proceed in propria persona against B, nor may he help A draft a Complaint against B. The lawyer's duty is to A alone.

This Opinion, like all other Opinions of this Committee is advisory only. (By-Laws, Article X, Sec. 3.)

OPINION NO. 224
(February 11, 1955)

ADVERTISING AND SOLICITATION. It is contrary to the Canons of Professional Ethics and is not permissible for an attorney to use professional card and letterhead with the designation "Attorney at Law and Certified Public Accountant."

A lawyer has presented the following inquiry to the Committee.

> "I have been a Certified Public Accountant since December, 1948 and recently was admitted to the Bar. I have had printed, but have not yet used, stationery and cards of which the enclosed is an example, since I recently have learned that there may be some question of ethics involved in its use.
> "I understand that some persons similarly situated do so combine the two titles on the same piece of stationery, but would like your opinion upon whether my stationery is acceptable."

The enclosed card and letterhead contain the name of the party, below that the designation "Attorney at Law," immediately below that the designation "Certified Public Accountant," and the street, city and state and telephone number, in that order.

Canon 27 of the American Bar Association Canons of Professional Ethics, "Advertising, Direct or Indirect," provides in part as follows:

> ". . . The customary use of simple professional cards is not improper."
> "It is unprofessional to solicit professional employment by circulars, advertisements, by touters or by personal communications or interviews not warranted by personal relations."

In construing Canon 27, the American Bar Association Committee on Professional Ethics and Grievances, in its Opinion No. 272, stated:

> "The Committee all deem it in the interest of the profession and its clients that a lawyer should be precluded from holding himself out, even passively, as employable in another independent professional capacity. We find no provision in the Canons precluding a lawyer from being a C.P.A., or from using his knowledge and experience in accounting in his law practice.
> "The Committee all agree that a lawyer, who is also a C.P.A. may perform what are primarily accounting services, as an

incident to his law practice, without violating our Canons. We are also agreed that he may not properly hold himself out as practicing accounting at the same office as that in which he practices law, since this would constitute an advertisement of his services as accountant which would violate Canon 27 as construed in our opinions."

(See also Drinker, Legal Ethics, page 221.)

The Committee feels that the net effect of the letterhead and the professional card is as follows:

(1) It holds the person out as being both a lawyer and a C.P.A. which are two separate professions and would induce persons to engage the person in one of the capacities because of the other and thereby serve as a feeder to his law practice.

(2) The letterhead and the professional card establish that two professions are being conducted by one person at the same place of business.

It is our opinion that the use of either the letterhead or the card is contrary to the Canons of Professional Ethics and is not a permissible practice.

This opinion, like all other opinions of this Committee is advisory only. (By-Laws, Article X, Section 3.)

Silver Memories

Compiled from the World Almanac and the L.A. Daily Journal of July, 1930, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

Motley H. Flint, well-known banker, former postmaster of Los Angeles, and member of a prominent California family, was murdered by Frank D. Keaton as he left the witness stand in the courtroom of Superior Judge **Frank C. Collier.** Flint had been testifying as a witness in a suit brought by **David O. Selznick** to recover $200,000 from the Pacific-Southwest Bank. The case was irrelevant to the assassin's interests.

* * *

Miniature golf course fans who indulge their favorite pastime in the wee sma' hours of the morning will soon be faced with a "golf curfew" at the stroke of midnight as a result of action taken by the Board of Supervisors. Baby-golf, like any other baby, is keeping all the neighbors awake.

* * *

The California Supreme Court, by a vote of 6 to 1, refused to recommend to Governor **Young** the pardon of **Thomas J. Mooney** and **Warren K. Billings,** convicted of participation in the 1916 bombing of a Preparedness Day parade at San Francisco in which 10 persons were killed and 40 hurt.

* * *

Declaring that American women are headed toward barbaric fads of nose-rings and lip-plates, **Jean Patou,** leaving New York to return to his native Paris, expressed his horror at the rapidly spreading fashion of brightly painted fingernails.

One hundred years younger but already seven times as long as the Constitution of the United States, the Constitution of California has 163 amendments and is threatened with 20 more, according to the findings of the new Constitution Revision Commission. Members from this area who are studying means for simplifying the State Constitution are **E. W. Camp, George E. Cryer, George E. Farrand, Dr. John R. Haynes, Leslie R. Hewitt** and **Dr. John Willis Baer.**

* * *

Hundreds of persons in Tennessee and Oklahoma are suffering from swollen feet and paralysis of the legs, attributed to poisoning from bootleg liquor. A mixture of ginger and creosote or crude carbolic acid, used in the southwest as a sheep-dip for vermin, is being blamed.

* * *

In the old lazy days of Alta California, money seldom figured in business transactions. In deeds recorded in the days of '49, varying amounts in grain gold, "clean and of good quality, troy weight," were designated as part payment. The principal mediums of exchange used in land sales of the times were cattle, hides, tallow, sheep and, in many instances, wine or brandy. Descriptions were vague as typified by the following deed dated July 16, 1851: "Josefa Lopez de Vejar to Felipa Rhim 13½ varas of land in front of my orchard, for which land Rhim has given me a double barrel shotgun, an equivalent transfer, to my entire satisfaction." **Pio Pico,** early Governor under Spanish rule, sold a residence holding in the Plaza district of Los Angeles in 1851 by a deed reading: "Pio Pico of the city of Los Angeles does sell and alienate unto Francisca Uribe of said city, wife of Francisco O'Campo, a certain house situate in this city, on one side of the Plaza, which belongs to him in property and possession by purchase made of the attorney of the legitimate heir Ana Maria Tosta. He sells it for the sum of four hundred head of cattle from 3 years up, half steers and one-half cows, which said purchaser promises to deliver at the rancho of Buena Esperanze during all of the present month of May of 1851."

Scanning the Committee Reports

The special committee for the Association's film, "Living Under the Law," which is composed of Loyd Wright, Jr., Chairman, Sharp Whitmore and Byron Walters, has been administering the use of the film, during the past year. Liaison was established by the committee with the Judges of the Municipal Courts and the Los Angeles Senior High Schools for use of the film in connection with the High Schools' program in civics. The film is delivered to the respective schools just before their scheduled tour of the Municipal Courts and is shown to the students as a foundation for the tour. This use of the film in the local high schools has insured wide distribution and showing among a large group of future citizens, whose education and understanding of the law and the administration of justice is of the utmost importance to both the community and the Bar. Thanks to the fine work of the committee this cooperative program between the schools, the Courts and the Bar Association is well established, has proven imminently successful, and will continue into the future.

The committee has also acquired a second print of the film which has been made available to civic organizations. The special committee invites requests from civic and social groups which are interested in the film. Inquiries should be directed to the office of the Association.